TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1191.

THE UNITED STATES EX REL: ROBERT CARRICK, PLAINTIFF IN ERROR,

vs.

LUCIUS Q. C. LAMAR, SECRETARY OF THE INTERIOR.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 30, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Filed Oct.* 13, 1885. *R. J. Meigs, Clerk.*

THE UNITED STATES *ex rel.* ROBERT CARRICK
vs.
LUCIUS Q. C. LAMAR, Secretary of the Interior. } No. 26424. Law.

[Seal Supreme Court of the District of Columbia.]

To the supreme court of the District of Columbia:

Your petitioner, Robert Carrick, begs leave to file this his petition praying for a writ of mandamus against Lucius Q. C. Lamar, the Secretary of the Interior of the United States, and respectfully shows to the court—

That he is the head of a family, over twenty-one years of age, and a citizen of the United States; that, being such, he, at some time prior to the first day of September, 1883, made a settlement in person upon a certain island situated in the Mississippi river, nearly opposite to the city of St. Louis, Missouri, known as Arsenal Islands, in sections 3, 9, & 10, township 44, range 7, State of Missouri, &, when surveyed from the State of Illinois, located in St. Clair county, township 2 N., R. 10 west, of the principal meridian, opposite to what is commonly known as common fields of Prairie Du Pont, and second subdivision of Cahakia Commons, said island containing about 230 acres, being about ten feet above high-water mark, not subject to overflow, and being suitable for agricultural purposes, & subject to pre-emption under the laws of the United States.

2 Your relator made such settlement & inhabited & improved the same, and erected a dwelling-house thereon for the purpose of obtaining a title thereto as soon as he could, under the provisions of chapter four of title 32 of the Revised Statutes of the United States, he not being the proprietor of 320 acres of land in any State or Territory, nor having quitted nor abandoned his residence on his own land to reside on public lands in the same State or Territory, & being qualified in all respects to obtain the benefit of the provisions of said statutes.

The lands are not mineral, nor have they been reserved by the Government of the United States, & have never been surveyed under any law or authority of the United States, & there are no improvements upon said island except those put upon the same by your relator, & that the United States Government has constructed certain embankments & walls, so that the said island is now fast & anchored land, & not liable to be changed by the action of the river.

For the purpose of obtaining a survey of said lands, & in order that he might avail himself of the rights he had acquired as such settler, your relator, on or about the first day of September, 1883,

3 made application in writing, according to the rules of the Department of the Interior, to the Commissioner of the General Land Office, in said Department, for such survey, stating that said island had never been surveyed by the U. S. Government; that he was desirous that the same should be surveyed, in order that it might be brought into market for disposal according to the laws of Congress & the regulations of the General Land Office

relative to the disposal of lands embraced in fragmentary surveys, and naming a practical & skillful surveyor as a suitable person to execute the same, who filed with such application his offer to execute such survey for a small sum named by him, which your relator held himself in readiness & offered to pay or deposit, as the Department might require.

Your relator applied to the Department of the Interior for instructions as to the manner of making such application, & in answer thereto received a printed blank, & this having, according to instructions, been proper filled out and signed, and the notices therein required having been given to proprietors opposite said island & to the city of St. Louis for a longer time prior to said application than was required by law or the rules of said Department, said application was filed, as hereinbefore stated, at about September 1st, 1883.

Your relator says that upon the hearing of said petition it was claimed by the city of St. Louis that this island was the same which had formerly been surveyed & had been conveyed to the said city, & which was formerly known as Quarantine Island, & had been set apart to said city in conformity with the provisions of the acts of Congress of June 13th, 1812, & May 26, 1824, relating to school lands.

But it appears & the fact is that the survey then made was of an island entirely above the place now occupied by Arsenal Island, no part of the space embraced within such survey being within the space now occupied by the said island, & it was not claimed or found by the Secretary of the Interior that such island had ever been surveyed, or that it belonged to the said city of St. Louis. Your relator says that the said island is not now within the boundaries of the corporation of the city of St. Louis, as it existed at the time of the passage of the acts of Congress above referred to relating to school lands, but is below the said boundaries.

The field-notes of the survey of Quarantine Island show that such survey was made with reference to a certain fixed point in the city of St. Louis, & all the boundary lines of said island were based upon & had such reference to such fixed point as not in any way to be applicable to the island now known as Arsenal Island, as a copy of said field-notes, filed with the Secretary of the Interior, will show.

The said Secretary of the Interior procured a report from the engineer of the War Department in charge of Government works of the United States in that vicinity, by which it also appears that the said island is not embraced within the former survey, & is not the property of the city of St. Louis, but is the property of the United States, & is not an accretion to anything. This report was approved by the Secretary of War of the United States.

The said island is now fixed & anchored land, & not liable to be changed by the action of the river, as is shown by affidavits filed before the Secretary of the Interior.

Said application was accompanied by a diagram, & also by affidavits supporting the facts stated therein, which were substantially the same as herein stated, and the affidavits, with accom-

panying proof of notices, was acknowledged to be and were trusted as proper in form & in conformity with the regulations of the Land Office in such cases.

The said Commissioner of the Land Office transmitted the said application to the Secretary of the Interior, with the recommendation that such survey be not made.

Whereupon your relator applied to the then Secretary of the Interior upon the said application and proofs accompanying the same, who, after hearing & considering the same, without any good reason therefor, as your relator is advised, denied the same, & refused to direct any survey of the said land, or any part thereof.

It is made by law & the practice of the department the duty of the Secretary of the Interior to direct the survey of lands of this character upon proper application filed.

Your relator farther states that he applied to this court for a writ of mandamus upon the then Secretary of the Interior to cause
7 such survey to be made upon the facts & circumstances & proofs hereinbefore stated, as will appear by reference to case No. 25810, & to papers filed therein, & thereupon rule was directed to be issued against him to show cause why such writ of mandamus should not issue, but owing to the fact that a hearing could not probably be had before the expiration of the term of office of said Secretary, your relator, at the suggestion of the court, for that reason did not procure the said rule to be served, and such proceedings could have no force against the present Secretary of the Interior.

Your relator thereupon renewed his application to the present Secretary of the Interior, L. Q. C. Lamar, & produced before him further evidence showing that said island still continued to be fast & anchored land, the former Secretary having based his refusal principally upon the ground that it was not fast & anchored land; but said Secretary Lamar, having examined the same, without any good reason therefor, as your relator is advised, denied the said application for a survey.

Your relator further makes known to the court that he is
8 entirely without remedy in the premises, unless the same be effected by the power and interposition of the court in granting its writ of mandamus.

Your relator therefore prays that a writ of mandamus may issue out of this honorable court directed to the said Lucius Q. C. Lamar, Secretary of the Interior, commanding him to direct a survey of Arsenal Island, situated in the Mississippi river, opposite the city of St. Louis, in sections 3, 9, & 10, township 44, range 7, State of Missouri, according to the regulations of the Land Office, in conformity with the laws of Congress relating to lands embraced in fragmentary surveys.

ROBERT CARRICK.

W. WILLOUGHBY,
Att'y for Relator.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

Robert Carrick, being sworn, says that he has read the petition above by him subscribed, and knows the contents thereof, and
9 that the facts therein stated upon his personal knowledge are true, and that the facts therein stated *stated* upon information and belief he believes to be true.

In witness whereof I have hereunto set my hand and official seal this 1st day of June, 1885.

[Seal Louis A. Picot, Notary Public for the City of St. Louis, Mo.]

LOUIS D. PICOT,
Notary Public, City of St. Louis, Mo.

Term expires June 26, 1885.

Endorsed: "Petition of Robert Carrick for mandamus. Certified to the court in gen'l term to be heard there in the first instance. W. S. Cox, J." Oct. 14, 1885. Filed Oct. 13, 1885. R. J. Meigs, clerk.

10 Supreme Court of the District of Columbia. In General Term, this 14 day of October, A. D. 1885.

ROBERT CARRICK }
vs. } At Law. No. 26424.
LUCIUS Q. C. LAMAR. }

This cause having come on to be heard upon the petition of Robert Carrick, certified to be heard in general term in the first instance, and having been duly considered, because it appears to the court that the grounds assigned by the petitioner for the mandamus he prays for are not sufficient in law to authorize the writ:

Therefore it is considered by this court that the motion for rule to show cause why the writ of mandamus should not issue be denied, & that the petition be dismissed with costs.

By the court:

D. K. CARTTER,
Ch'f Justice.

11 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is in the said court before you, between the United States on the relation of Robert Carrick, plaintiff, and Lucius Q. C. Lamar, defendant, being cause No. 26424 at law, a manifest error hath happened, to the great damage of the said relator, as by his complaint appears, and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the

United States, together with this writ, so that you have the same at Washington on the fourth Monday of October, 1885, in the said Supreme Court to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 21st day of October, in the year of our Lord 1885, and of the Independence of the United States the one hundred and tenth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To Lucius Q. C. Lamar:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the fourth Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The United States on the relation of Robert Carrick is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness David K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Ch'f Just.

[Endorsed:] 3-1191. No. 26424. Law. The United States *ex rel.* Robert Carrick *vs.* L. Q. C. Lamar, Sec'y of the Interior. Writ of error and citation. Served a copy of the within writ of error and citation on the within-named L. Q. C. Lamar, Secretary of the Interior, Oct. 21st, 1885. Clayton McMichael, marshal.

12 *Filed Oct.* 21, 1885. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia, the — day of ——, 188–. In Error.

THE UNITED STATES on the Relation of ROBERT CARRICK } No. —.
vs.
LUCIUS Q. C. LAMAR. }

Know all men by these present that we, Rob't Carrick and Henry Clay Conde, are bound unto the above-named Lucius Q. C. Lamar in the sum of two hundred & fifty dollars, to be paid to the said Lucius Q. C. Lamar, his executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 17th day of October, 1885.

Whereas the above-named relator hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named relator shall prosecute his said writ to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

[Seal Supreme Court of the District of Columbia.]

ROBERT CARRICK. [SEAL.]
HENRY C. CONDE. [SEAL.]

Sealed and delivered in presence of—
ROBERT I. ROMBOMER.
THEO. I. CHILDS.

I believe the above bond is a good and sufficent bond.
ISAAC H. STURGEON,
Collector Int. Rev., 1st Dis. Mo.

St. Louis, Oct. 17, 1885.

13 STATE OF MISSOURI, } ss:
City of St. Louis, }

Henry C. Conde, being duly sworn, on his oath says that he is worth the sum of two hundred and fifty dollars over & above his debts and liabilities.

HENRY C. CONDE.

Subscribed & sworn to before me this 17th day of October, 1885.
THEO. I CHILDS,
Dep'y Coll. Int. Rev., 1st Dist. Mo.

Approved this 21st day of Oct., 1885.
D. K. CARTTER,
Ch'f Justice.

14 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 27th day of October, 1885.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 27th day of Oct'r, 1885.

[SEAL.] D. K. CARTTER,
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 27th day of October, 1885.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

[Endorsed:] U. States on relation of Robert Carrick *vs.* Lucius Q. C. Lamar, Sec'y of Interior.

Endorsed on cover: Dist. of Columbia supreme court. No. 1191. The United States *ex rel.* Robert Carrick, pl'ff in error, *vs.* Lucius Q. C. Lamar, Secretary of the Interior. Filed October 30, 1885.

SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES ON THE RELATION OF ROBERT CARRICK, *Plaintiff in Error*,

vs.

LUCIUS Q. C. LAMAR, *Secretary of the Interior, Defendant in Error.*

No. [illegible]

And now comes the plaintiff in error, and moves that the hearing of this cause may be advanced for the following reasons:

This cause was an application for a writ of mandamus upon the defendant Secretary Lamar, commanding him to direct a survey of Arsenal Island, situated in the Mississippi River, opposite the city of St. Louis in conformity with the laws of Congress relating to lands embraced in fragmentary surveys. The petition therefor filed in the Supreme Court of the District of Columbia states that the relator had all the qualifications of one entitled to pre-emption of public lands; that as such he had made a settlement in person upon this island September, 1883, and had since inhabited and improved the same, and had erected a dwelling house thereon, for the purpose of obtaining title thereto, under the provisions of the pre emption laws. That such Island was public land of the United States, not reserved by the United States, and had never been surveyed. That for the purpose of obtaining title, the relator applied to the Department of the Interior according to the rules of the office

relating to fragmentary surveys, setting forth the facts showing his right to such survey, and naming a practical surveyor, and offering to pay the cost of such survey. That the city of St. Louis claimed title to such island; but setting up such facts as were claimed to show that it had no such title; that such island was fixed, and suitable for agricultural purposes; that Secretary Teller had denied such application, whereupon the petition was renewed, and was again denied by Secretary Lamar, as petitioner claims, without any good cause.

The petition was referred to the General Term of the Supreme Court to be heard in the first instance, and such Court in General Term refused to issue a rule to show cause why a writ of mandamus should not issue, whereupon a writ of error was obtained for hearing before this Court.

The plaintiff in error believes that he cannot obtain a hearing in this Court, and that justice will be denied him, unless the hearing thereof be advanced, for the reason that by the close of term of office of an officer of the Government a suit for mandamus abates, and his successor in office cannot be substituted, as has been held by this Court in *United States* vs. *Boutwell*, 17 Wall., 604. As such term of office may expire at any time, to avoid the danger of abatement, the plaintiff in error asks that the hearing of this cause may be fixed at an early date.

ROBERT CARRICK,

By his Counsel,

W. WILLOUGHBY.

Clerk's Supreme Court U. S.
FILED.
DEC 30 1885
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

THE UNITED STATES, ON THE RELATION OF ROBERT CARRICK, PLAINTIFF IN ERROR,

v.

LUCIUS Q. C. LAMAR, SECRETARY OF THE INTERIOR, DEFENDANT IN ERROR.

No. 1191.

Points and Argument of Plaintiff in Error.

This cause was an application for a writ of mandamus upon the defendant, Secretary Lamar, commanding him to direct a survey of Arsenal Island, situated in the Mississippi River opposite the city of St. Louis, in conformity with the laws of Congress relating to lands embraced in fragmentary surveys. The petition therefor filed in the Supreme Court of the District of Columbia states that the relator had all the qualifications of one entitled to pre-emption of public lands; that as such he had made a settlement in person upon this island, September, 1883, and had since inhabited and improved the same, and had erected a dwelling-house thereon for the purpose of obtaining title thereto, under the provisions of the pre-emption laws. That such island was public land of the United States, not reserved by the United States, and had never been surveyed. That for the purpose of obtaining

title, the relator applied to the Department of the Interior, according to the rules of the office relating to fragmentary surveys, setting forth the facts showing his right to such survey, and naming a practical surveyor, and offering to pay the cost of such survey. That the city of St. Louis claimed title to such island; but setting up such facts as were claimed to show that it had no such title; that such island was fixed, and suitable for agricultural purposes; that Secretary Teller had denied such application, whereupon the petition was renewed, and was again denied by Secretary Lamar, as petitioner claims, without any good cause.

The petition was referred to the General Term of the Supreme Court to be heard in the first instance, and such Court in General Term refused to issue a rule to show cause why a writ of mandamus should not issue, whereupon a writ of error was obtained for hearing before this Court. The value of the land exceeds $5000

(Affidavit filed)

ASSIGNMENT OF ERRORS.

1st. The Court in General Term erred in refusing the application for a rule to show cause why the writ of mandamus should not issue as prayed.

2d. The Court erred in not considering the facts set forth in the petition as sufficient to entitle the petitioner to a rule to show cause why the writ of mandamus prayed for should not issue.

3d. The Court erred in not considering the facts set forth in the petition as sufficient to entitle the petitioner to the writ of mandamus.

AUTHORITIES.

The Secretary of the Interior is charged with the supervision of public business relating to the public lands and

is the officer charged with the duty of directing surveys of such lands.

Secs. 441, 453 R. S. U. S.
Barnard *v.* Ashby, 18 How., 43.
Bell *v.* Hearne, 19 How., 252.
Magwire *v.* Tyler, 1 Black., 195.

The statute (ch. 4, Title 32, R. S.) defines with precision the lands which are subject to pre-emption, (sec. 2257, 2258.) *All* lands except those particularly described are declared to be subject to what is styled the "*right of pre-emption.*" The land described in the petition is not within the exceptions.

The petitioner shows himself to be one having all the qualifications of one entitled to such right, and that he has complied with all the requirements of this office, as far as he could and was permitted to do. If there be any failure to comply with such requirements, by reason of the action of the Department, it would not invalidate his claim. Lytle *v.* Arkansas, 9 How., 333. Such right is a "legal right subject to be defeated only by a failure to perform the conditions annexed to it." It was of such substantial character that no act of a private party, under a subsequent act of Congress, could invalidate it.

Lytle *v.* Arkansas, 9 How., 333.

In the Yosemite Valley case, (15 Wall., 76, &c.,) this right was more particularly defined and held to be an established legal right as against all parties, except the United States. It was a legal right as against other parties to be preferred in its purchase.

The public faith is pledged to one who showed himself entitled to the right of pre-emption.

Wirth *v.* Bronson, 98 U. S., 118.

In Frisbie *v.* Whitney, (9 Wall., 187,) where the distinction is made as to the United States and other parties, but which sustains the case in 9 Howard, it was argued that there was no law by which unsurveyed lands could be legally entered upon with a view to pre-emption. The Court says, "But in the view which the Court takes, it may be assumed that the lands were open to pre-emption."

In 3d Op. Atty.-Gen., p. 285, it is said, "when a pre-emption claim exists, and has been duly established, the party is *clearly* entitled to the benefit of a survey, in conformity to law." Again, "It is the duty of the Department to direct a survey, if such a course be necessary to the protection of any right duly claimed under the pre-emption laws or otherwise. (*Id.*)

In the law, (Title 32, ch. 4, R. S.,) there is no distinction between surveyed and unsurveyed lands as to the right of pre-emption. *All* lands are subject to such right, whether surveyed or unsurveyed, with the exceptions only that are specified. That unsurveyed lands were contemplated is evident from the fact that they are expressly mentioned in Secs. 2266, 2274, and 2275, where certain requirements are prescribed as to settlements upon *unsurveyed* lands. No distinction has ever been made in the office as to such right between surveyed and unsurveyed lands. Such right has been uniformly recognized as to unsurveyed lands, as well as to surveyed lands.

As late as May 27, 1885, the Secretary directed the survey of an island in the Mississippi river, in the case of Anthony Wyland, (vol. 3 of Land Decisions, p. 561 :)

"Fractional sections containing one hundred and sixty acres or upwards shall in like manner, as nearly as practicable, be subdivided into half-quarter sections, under such

rules and regulations as may be prescribed by the Secretary of the Interior."

Sec. 2397, R. S. U. S.

See, also, sec. 2407, R. S. U. S.

There is the same duty as to fractional surveys as to those provided for by the other sections of the law. (3 Op. Attys.-Gen., 285.)

The plaintiff in error was invited to do what he did in settling upon the land and spending over two years of his time as such settler, and erecting a dwelling and making improvements. He had the pledge of the Government that this should entitle him to the right of pre-emption. He cannot avail himself of his right except upon survey being made. He has done all he could to obtain such survey from the only Department that could legally make it. He now has no other remedy but the writ of mandamus prayed for, and to this it is respectfully submitted he is entitled.

W. WILLOUGHBY,

Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES

THE UNITED STATES ON THE RELATION OF ROBERT CARRICK, *Pl'ff in Error.*

vs.

L. Q. C. LAMAR, *Sec'y, Deft. in Error.*

No. 1191.

Additional Brief of Plaintiff in Error.

Section 2118 R. S., prescribes that the Secretary *shall* take the necessary measures for the completion of the public land surveys.

> "When a plain official duty requiring no exercise of discretion is to be performed, and performance is refused *any person* who will sustain personal injury by such refusal may have a mandamus to compel its performance."
>
> *Board of Liquidation* vs. *McComb*, 92 U. S., 541; *Johnson* vs. *Towsley*, 13 Wall., 86.

Where by misconstruing the law the officers have withheld from a party his just rights the courts may interfere.

Quinby vs. *Conlan*, 104 U. S., 420.

The petitioner has a substantial right recognized by law.

Shipley vs. *Crowan*, 91 U. S., 330.

The petitioner cannot avail himself of such right without a survey.

Sec. 2264, R. S.

It is conceded that the courts will not interfere where the action of the officer is, or can be, based upon any decision *within the scope of his authority*. But he cannot withhold his action upon the ground that the government *may* wish such land for its own purposes, or that it is not such kind or quality of land as to be subject to pre-emption, unless it be to determine whether such land comes within some exception defined by Congress. The principle is intended to be clearly defined in *Marquez* vs. *Fisher*, 101, 476, where it is stated that the decision of the officers of the Land Department made *within the scope of their authority on questions of this kind* is in general conclusive everywhere. The questions referred to are those submitted to such officer by law. This principle will not sustain him upon any and every reason he may give, frivolous or otherwise, for refusing *to act at all*. Such reason should be based upon the decision of some "question" which he is authorized to decide. That such land *may* be wanted by the Government for some possible future use, or that the land is not of sufficient value to justify such survey, which (by the way) are reasons inconsistent with each other are not questions submitted to the judgment of the Secretary, and do not justify the denial of a right recognized by Acts of Congress and by this Court.

W. WILLOUGHBY,
Counsel for Pl'ff in Error.

1164 B

Office Supreme Court U. S.
FILED.
JAN 6 1886
JAMES H. McKENNEY.
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

THE UNITED STATES, EX REL. ROBERT Carrick, plaintiff in error,
v.
LUCIUS Q. C. LAMAR, SECRETARY OF the Interior.
} No. 1191.

BRIEF FOR RESPONDENT.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

THE UNITED STATES, EX REL. ROBERT Carrick, plaintiff in error,
v.
LUCIUS Q. C. LAMAR, SECRETARY OF the Interior.
No. 1191.

BRIEF FOR RESPONDENT.

On the 13th of October, 1885, the relator, Robert Carrick, filed his petition in the supreme court of the District of Columbia, praying that a writ of mandamus might be issued, directed to the said Lucius Q. C. Lamar, Secretary of the Interior, commanding him to direct a survey of Arsenal Island, situated in the Mississippi River, opposite the city of Saint Louis, in sections 3, 9, 10, township 44, range 7, State of Missouri, according to the regulations of the Land Office, in conformity with the laws of Congress relating to lands embraced in fragmentary surveys.

On the 14th day of October, 1885, the supreme court of the District of Columbia, in general term, decided that

the motion for a rule to show cause why the writ of mandamus should not issue should be denied, and that the petition should be dismissed with costs, for the reason that the grounds assigned by the petitioner for the mandamus were not sufficient in law to authorize the writ. From that judgment of the supreme court of the District this writ of error has been sued out.

We submit that the judgment of the court below was plainly right. The extent of the jurisdiction which may be lawfully exercised by the Federal courts over the officers of the Executive Departments of the Government has been often discussed in this court. (1 Cranch., 137; 12 Peters, 524; 14 Peters, 497; 4 Wallace, 522; 5 Wallace, 563; 7 Wallace, 347; 17 Howard, 284; 17 Howard, 475; 6 Howard, 92; 9 Wallace, 575; 101 U. S., 473; 104 U. S., 694; 9 Wallace, 298; 17 Howard, 225.)

Ever since the case of Marbury *vs.* Madison, to the present time, the rule has been well recognized and settled that a mandamus cannot issue in a case where discretion and judgment are to be exercised by the officer, and it can only be granted where the act required to be done is merely ministerial and the relator is without any other remedy.

In the leading case of Decatur *vs.* Paulding (14 Peters, 499) it was held that the Supreme Court cannot entertain an appeal from a decision of one of the Secretaries, nor revise his judgment in any case where the law authorizes him to exercise his discretion or judgment; nor can it by a mandamus act directly upon the officer or guide or control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties.

The interference of the courts with the performance of the ordinary duties of the Executive Departments of the Government would be productive of nothing but mischief; and this power was never intended to be given to them.

In United States *vs.* The Commissioner (5 Wallace, 563), it was decided that a mandamus will not be granted to compel the issuing of a patent for land in a case where numerous questions of law and fact arise, some of them depending upon circumstances which rest in parol proof yet to be obtained, and where the exercise of judicial functions is required; nor where it is reasonable to presume that there are persons at the time in possession under another title, and should have an opportunity to defend.

In Litchfield *vs.* Register and Receiver (9 Wallace, 577), Mr. Justice Miller, delivering the opinion of the court, said:

> The principle has been so repeatedly decided in this court, that the judiciary cannot interfere either by mandamus or injunction with executive officers, such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here.

In Marquez *vs.* Frisbie (101 U. S., 473), Mr. Justice Miller, speaking for the court, said:

> We have repeatedly held that the courts will not interfere with the officers of the Government while in the discharge of their duties in disposing of the public lands, either by injunction or mandamus.

And again:

> That principle is that the decision of the officers of the land department, made within the scope of their authority, on questions of this kind, is, in general, conclusive everywhere, except when considered by way of appeal within that department, and that, as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive, even in courts of justice, when the title afterwards comes in question.

In this case it appears upon the face of the petition itself that upon the hearing of said petition by the Commissioner of the Land Office it was claimed by the city of Saint Louis that this island was the same which had formerly been surveyed and had been conveyed to the said city, and it was formerly known as "Quarantine Island," and had been set apart to said city, in conformity with the provisions of acts of Congress June 13, 1812, and May 26, 1824, relating to school lands.

It appears that the said Commissioner of the Land Office transmitted the said application to the Secretary of the Interior with the recommendation that such survey be not made; whereupon the relator applied to the then Secretary, upon the said application and proofs accompanying the same, who, after *hearing* and *considering* the same, denied it and refused to direct any survey of the said land or any part thereof.

It appears that the relator renewed his application to the present Secretary, Lucius Q. C. Lamar, and produced before him further evidence showing that said island still continued to be fast and anchored land, the former Secretary having based his refusal upon the ground that it was

not "fast and anchored land"; but said Secretary Lamar, having *examined* the same, denied the said application for the survey.

It is true the petition states also in this connection that the said Secretaries rejected the application for survey without good reason therefor, as the relator is advised, but the statement that in the one case the Secretary, after *hearing* and *considering* the said application, and the other, after *examining* the same, rejected it, is sufficient to show that the case was one which involved the exercise of judgment and discretion on the part of the said Secretaries.

It appears from the decision of Mr. Secretary Teller, reported in second volume of decisions of the Department of the Interior, relating to public lands, page 456, that he was of opinion that so long as the island retained its drifting character, and until it becomes what is termed "fast and anchored land," and until, also, the ultimate purpose of Congress, engaged through the War Department in operations tending to fix this drift and secure permanency of the channel affected thereby, was known, the Interior Department should take no action tending to hamper or interfere with said operations; and that the island should not then be surveyed as public land.

On the 7th day of August, 1884, Mr. Acting Secretary Joslyn, before whom an application was made for a reconsideration of the decision of Secretary Teller, decided that reconsideration should not be granted without the fullest investigation and the hearing of all parties interested, nor while the Government was carrying on its work, and while it was uncertain to what extent the island might be required for public use (vol. 2, Land Decisions, p. 468).

On March 21, 1885, the relator filed another application for a review before the present Secretary, Mr. Lamar, alleging no new matter for consideration further than that the Acting Secretary had denied said motion without the knowledge of counsel or without hearing oral argument. Mr. Secretary Lamar denied said motion for review, holding it to be well settled practice since as far back as 1825 to regard a subject once disposed of by the proper executive department as having been finally settled, except under different facts, a change of law, or other exceptional or anomalous circumstances (4 Op. Att'y-Gen., 341; 15 *Id.*, 315).

Secretary Lamar was of opinion that no circumstances were here presented which warrant a departure from this wise and conservative rule, and, further, that were the application for review presented for the first time it would be denied for the sufficient reasons given by Acting Secretary Joslyn.

The attention of the court is also called to the fact that the petition does not show that the value of the land exceeds $5,000. By section 1 of the act of March 3, 1885, it is enacted that no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, unless the matter in dispute, exclusive of costs, shall exceed the sum of $5,000.

Copies of the opinions of Mr. Secretary Teller, Mr. Acting Secretary Joslyn, and Mr. Secretary Lamar are hereto appended.

We submit that for the reasons therein stated the ap-

plication for the survey was properly denied by the Interior Department. We submit also that the statements contained in the petition of the relator are plainly insufficient to entitle him to the remedy sought, and that the judgment of the court below should be affirmed.

Very respectfully,

JOHN GOODE,
Solicitor-General.

APPENDIX.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., May 16, 1884.

The COMMISSIONER OF THE GENERAL LAND OFFICE:

SIR: You transmitted to me October 13, 1883, the application of Robert Carrick, of Saint Louis, Mo., for the survey of an island in the Mississippi River called "Arsenal Island," stated to be located in secs. 3, 9, and 10, T. 44, R. 7, Missouri, opposite the city of Saint Louis, and which when surveyed from the State of Illinois is located in Saint Clair County, Illinois, in T. 2 N., R. 10 W., opposite what is commonly known as Common Fields of Prairie du Pont, and second subdivision of Cahokia Commons.

The applicant also asks, that when surveyed, the island may be brought into market for disposal according to the laws of Congress and the regulations of the General Land Office relative to the disposal of lands embraced in fragmentary surveys. Affidavits accompanying the application state that this island contains about 230 acres; that the width of the channel on either side between the island and the main shore is from 1,500 to 2,000 feet; that the depth thereof at ordinary stages of the water is about 10 feet above high-water mark, not subject to overflow; and that the land is fit for agricultural purposes; that the configuration of either shore has not materially changed since the original survey of the water front on the mainland, and there are no existing improvements on the island.

Notice that the application would be made appears to have been served upon the governors of the States of

Missouri and Illinois, upon the mayor of the city of Saint Louis, and upon sundry proprietors of land on either side of the Mississippi River opposite the island, claiming or supposed to claim riparian rights thereto. After argument by the respective counsel for Carrick and the city of Saint Louis, you reached the conclusion that title to the island as it now exists is in the city of Saint Louis, and, while rejecting the application, submit it for my examination and instructions.

There has been no hearing in the case, and the facts are informally presented by sundry *ex parte* affidavits, by the protests of the riparian owners against the survey, and by the report of Major Ernst to the War Department, under date of January 11, 1884.

It appears from the latter that Arsenal Island is a low alluvial island lying near the middle of the Mississippi River, subject to overflow at high-water mark, and its banks subject to erosion at all stages; that it was under water part of the years 1875, 1876, 1877, 1881, 1882, and 1883, but not submerged at all in 1872, 1874, and 1879, and but a few days in 1873, 1878, and 1880; that the main channel of the river was west of the island in 1821, and still west of it in 1830, with a fair inference that it had been so for a number of years; east of it in 1838, with a fair inference that it had been so since about 1835; west of it in 1839, east of it in 1844, still east of it in 1853 and from 1861 to 1865; west of it from 1866 to 1873; east of it from 1874 to 1878, and west of it from 1879 to 1884. Whether, therefore, this island is now within the State of Illinois or within the State of Missouri does not, under these facts, clearly appear.

Arsenal Island (then called Quarantine Island) appears to have been first surveyed as a whole in 1853, and to have contained 404.65 acres. It was again surveyed in 1863 and found to contain but 119.57 acres.

Under the acts of Congress of June 13, 1862, and May 26, 1824, the surveyor-general of the State of Missouri,

under the direction of the Commissioner of the General Land Office, February 10, 1863, assigned and set apart a portion of the island designated as survey No. 411, of Saint Louis lands, containing 109.92 acres, to the board of Saint Louis public schools, and August 25, 1864 the Commissioner allotted to the schools, under a selection made by the State's agent, the remaining part of the island, containing 9.65 acres, and the selection was approved by this Department September 8 following.

February 8, 1866, the school board sold and conveyed to the city of Saint Louis "the whole and every part of said island." Under the said acts and under that of August 3, 1854 (10 Stat., 346, now sec. 2449, Rev. Stat.), which makes such approval equivalent to a patent, the title of the United States to the island and all its rights thereto was divested and vested in the public schools and their grantees.

The right of the city of Saint Louis to the original island is not disputed by the applicant, but he claims—and the fact so appears—that it has shifted downwards, and that as its head is washed away under the ordinary currents of the river and otherwise, its foot is enlarged, and that there has been a continual growth at the down-stream end. Major Ernst states that the up-stream end moved southward about 1,700 feet between 1837 and 1863, and that since 1863 it has moved further southward about 4,800 feet—the rate of motion since that date being about 240 feet per year or 8 inches per day.

The applicant claims that this new formation is public land of the United States and subject to disposal as such; the city of Saint Louis, that it is accretion merely to the original island and belongs to the city; and the owners of land upon either side of the river, that they have riparian rights thereto. There appear also to be undetermined jurisdictional questions as to this formation between the States of Illinois and Missouri, and it is understood that

actions commenced by citizens of the State of Illinois are now pending in the proper courts touching its status.

Without expressing any opinion upon the respective rights of these several claimants to this new formation, I do not think you would be justified in ordering its survey, because under the facts presented it is not fast land, but a mere drift or float of sand and other material carried by the waters of the river from one point and deposited temporarily upon another, the process of erosion and accretion being constantly at work.

As above stated, the original island embraced 404 acres in 1853, reduced in 1863 to 119 acres, and from 1837 to 1863 its upstream end moved southward about 1,700 feet, or about one-third of a mile, and since the latter date it has been, and now is, moving in the same direction at the rate of 8 inches per day, so that even during the time of a survey what would be a monument and boundary to-day might require change to-morrow. The new formation, if surveyed and disposed of as public land, would thus very soon present the same questions which are now presented respecting the original island. Hence, so long as the same causes continue to operate and make this formation a mere moving mass of alluvial deposits from one end to the other, repeated day by day, it would seem useless to establish corners and monuments subject to immediate obliteration. Such a formation has not, in my judgment, the fixed and permanent characteristics which make it a solid part of the earth's surface, capable of supporting title under the laws relating to the public lands.

It is also brought to my attention that the War Department, under the authority of Congressional appropriation acts for the improvement of the channel of the Mississippi River, a matter of great public moment, is engaged in operations tending to fix this drift and secure permanency and stability in the channel affected thereby. This is a Government work, and should not, in my judg-

ment be hampered nor interfered with by this Department.

Until, therefore, the ultimate purpose of Congress in this respect is known, and until this formation from natural or artificial causes ceases to retain its drifting and uncertain character, and becomes what is termed "fast" or "anchored" land, it should not be surveyed as public land.

Concurring with you in the rejection of the application, I return the papers transmitted with your letter of October 13, 1883.

Very respectfully,

H. M. TELLER,
Secretary.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., May 25, 1885.

The COMMISSIONER OF THE
GENERAL LAND OFFICE:

SIR: On September 1, 1883, Robert Carrick made application to your office for the survey of an island in the Mississippi River, opposite the city of Saint Louis, commonly called and known as "Arsenal Island," for the purpose of having the land placed in the market for disposal in accordance with the provisions of law and the regulations of the Land Office—he (Carrick) alleging settlement and improvement thereon and his qualification to pre-empt the same. After due notice to all parties interested or supposed to be interested, and upon due consideration, your office concluded that the title to said island was in the city of Saint Louis, but, while rejecting Carrick's application, referred the matter to this Department for examination and instructions.

On May 16, 1884, my predecessor, Secretary Teller, after a full review of all the facts and the law touching the matter, while not committing himself as to the ques-

tion of title, concurred with your office and rejected Carrick's application (2 L. D., 456).

A motion for review of that decision was filed, on the ground that error had been committed in holding that the testimony showed the island to be a mere moving mass of alluvial deposit from one end to the other; and with the motion were filed the affidavits of two civil engineers, who stated that from their personal knowledge the island had become permanent and fixed land.

It was held that this testimony only had the effect of producing a conflict with that on file at the time of the former decision, and was not sufficient of itself to cause a reversal of the same on review; and further, that inasmuch as the War Department, under the appropriation acts for the improvement of the Mississippi River, was operating upon the island, and it was unknown to what extent or for what purpose the Government might require the same in connection with the great public work about which it was engaged, it would be improper under the circumstances to order a survey. So the application for rehearing was denied by Acting Secretary Joslyn (2 L. D., 468).

On March 21, 1885, the attorney for Carrick filed another application for review, alleging no new matter for consideration further than that the Acting Secretary had denied said motion without the knowledge of counsel, or without hearing oral argument; for making which an opportunity is now asked.

The fact that the opportunity for an oral argument is now sought adds no force to the application, which, after all, is but an effort to obtain a review, not only of the decision of my predecessor, but of his refusal to revoke the same; and this, too, not on any new grounds or testimony, but on the bald assumption that error was committed in the conclusions arrived at.

It has been well settled practice, since as far back as 1825, to regard a subject once disposed of by the proper

Executive Department as having been finally settled, except under different facts, a change of law, or other exceptional or anomalous circumstances (4 Op. Att'y-Gen., 341; 15 *Id.*, 315). No circumstances are here presented which would warrant a departure from this wise and conservative rule.

Indeed, were the application for review now presented for the first time it would be denied, for the sufficient reasons given by Acting Secretary Joslyn.

The motion is overruled.

Very respectfully,

L. Q. C. LAMAR,
Secretary.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., August 7, 1884.

The COMMISSIONER OF THE GENERAL LAND OFFICE:

SIR: On May 16 last, this Department affirmed your decision rejecting the application of Robert Carrick for survey of Arsenal Island, opposite the city of Saint Louis, in the Mississippi River, holding that so long as the island retained its drifting character, and until it becomes what is termed "fast" or "anchored" land, and until also the ultimate purpose of Congress—now engaged, through the War Department, in operations tending to fix this drift and secure permanency in the channel affected thereby—is known, this Department should take no action tending to hamper or interfere with the said operations, and hence that the island should not be now surveyed as public land.

A motion has been filed for reconsideration of this decision, upon the ground that the facts upon which it was based—so far as respected the character of the island—were erroneous. These facts were taken chiefly from an official report of Major Ernst, of the Engineer Corps under date of January 11 last, to whom the subject-